

IN THE INDUSTRIAL COURT OF SWAZILAND

HOLDEN AT MBABANE.

CASE NO: 64/90

In the matter between:

MICHAEL ALAN COLSON

Applicant

VS.

TRANSCENTURY CORPORATION

Respondent

C O R A M:

J.A. HASSANALI

President

MR. DUNSEITH

For

Applicant

MR. P. FLYN

For

Respondent

MR. V. DLAMINI &

MR. MATSEBULA

Assessors.

AWARD

(Delivered 4/2/91)

Hassanali, P.

In this Application the Applicant is claiming the following from the Respondent for his unfair termination -

- |     |  |           |
|-----|--|-----------|
| (a) | Payment in lieu of Notice                              | 4500.00   |
| (b) | 1 ½ months salary as damages in lieu of re-instatement | 6750.00   |
|     |  | E11250.00 |

The Respondent in its reply denied unfair termination but claimed that his contract of employment which was effective until 30/4/88 ended on that day. Therefore the applicant was not entitled to any benefits as claimed in his application.

I shall briefly set out the background to this application.

Transcentury Corporation the Respondent is a Consultant Firm based in Washington and was under a contract with the USAID in Swaziland to implement the manpower Development Project, arising from a bilateral agreement entered into by the Swaziland Government and USA. The purpose of this project was to provide training to the Swazi Nationals, in and out of the country. In order to manage the said Project, the Respondent employed the Applicant by letter dated

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24/2/86 (Ex.A) as a Participant Process Manager at an annual salary of \$ 23000. His period of employment however was not indicated in the letter and therefore the applicant assumed that he had been employed until the completion of the said project on 31/12/90. According to paragraph eleven of the letter, his appointment was determinable by the Respondent giving him 30 days notice. This paragraph reads as follows:-

"If after the probation period, your work shall become unsatisfactory or if for any reason the position offered should cease to exist. TransCentury reserves the right to terminate you with thirty days notice."

By an Agreement dated 30/10/87 (Ex.D) that agreement was reserved for a further period until 24/2/88 with a condition that by mutual consent it could be extended or modified. It also gave the Respondent the right to terminate his employment for any cause with 30 days notice.

His Contract was again renewed by an agreement dated 25/2/88 (Ex.E) for a further period of two months, to expire on 30/4/88. This Agreement too was based on the same terms and conditions as that of the earlier Agreement (Ex.D). When Applicant's contract expired on 30/4/88, it was not renewed.

It appears from the evidence that it had been the normal practice of the parties, before the expiry of a contract, to sit and negotiate fresh terms for a renewal. As such the Applicant and Mr. Louis Mitchell, the Chief of Party of the Respondent Corporation, met in April 1988 before the expiry of his contract and prepared a Draft Agreement (Ex.G) which is also called a working document. One of its conditions was that the Applicant should remain with Swaziland Manpower Development Project until June, 30 1988. This Document was said to have been prepared after Mr. Louis Mitchell had indicated to the Applicant that the Funds were available for the Project. This document remained with the Respondent, in the Applicant's personal file until it was sent to him as a result of his letter dated 29/4/88 (Ex.F). According to the Applicant the words "10 days" written

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in ink in Ex.G was in the handwriting of Mr. Mitchell. Miss Richards neither denied nor admitted to this. In my view since this document (Ex.G) was in the possession of the Respondent, it is very likely that the parties would have discussed the Draft Agreement and that Mr. Mitchell on behalf of the Respondent would have okayed the Applicant's renewal.

I will now turn to the document Ex. H which document in my opinion is very crucial to this case. According to the applicant when Mr. Mitchell initialled this document after having discussed it with him, Miss Richards, Mr. Moffet and Mrs Joy Christie were also present in the room. When Mrs. Joy Christie was asked to prepare the contract, the applicant assumed that it was the end of their negotiations and that his contract would be renewed and extended up to 15/7/88. Meanwhile according to applicant, Mr. Mitchell left the Country on 22/4/88 and Miss Richards became the Acting Chief of Party. On 27/4/88 she informed the applicant that as his contract had not been approved by the USAID, his period with the Respondent would end on 30/4/88 in terms of Ex.E. The applicant has stated that he was unaware that the approval of USAID was necessary since this had never happened before. He submitted that his contract was with the Respondent and that there was no claim in the Agreement to suggest that this approval was a prerequisite for his appointment or for his renewal.

Miss Richards who gave evidence on behalf of the Respondent maintained that she was in another room when Mr. Mitchell and the Applicant discussed this document, and was not aware of what was being said. She stated that she and Mr. Mitchell had been working together for sometime and that being quite familiar with his handwriting, the initial L on the document was not his. According to her he signed documents either as 'L M' 'L Mitchell' or 'Louis Mitchell' but never as L.

Therefore the question is whether Mr. Mitchell placed his initial on Ex. H as alleged by the Applicant.

Only Mr. Mitchell can answer this but unfortunately he has left the Country and getting him down to give evidence would entail the parties heavy .....

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expenses. The next best thing would have been to have submitted the disputed Document to a handwriting expert for his opinion, but for some reason or other this was overlooked.

Miss Richards stated that Mr. Mitchell signed documents as 'L.M.' 'L Mitchell' or as "Louis Mitchell", but not one document was produced in Court to substantiate this.

Another witness who perhaps could have thrown some light on this Document, Mrs. Christie, the Executive Officer to whom, according to the applicant Ex.H was given for the preparation of the Agreement was not called by the Respondent to give evidence, even though she was still with them.

Mr. Dunseith representing the Applicant argued that since there was a similiarity between the 'L' in Ex. H and in Exs. D & E, he asked Court to examine the initial L in Ex. H and compare it to the initial of Louis in Exs D and E.

The general principle on this is that the Court could compare the disputed signature, writing or seal of a person with the signatures, writings or seals which have been admitted or proved to the satisfaction of the Court to have been made or written by that person.

In this regard I shall refer to Sec. 39 of the Civil Evidence Act No. 16/1902 which reads as follows:-

"Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine shall be permitted to be made by witness, and such writing and the evidence of witness respecting it may be submitted to the Court in any case as evidence of the genuiness or otherwise of the writing in dispute."

Therefore the Court can examine the initial L in Ex.H and compare same with the initials of Mr. Mitchell in Exs. D and E. which signatures have been admitted by the Parties to be genuine.

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Having carefully examined the Initial L in Ex. H and having compared it with the first letter 'L' of the signature of Mr. Mitchell in both exhibits D and E respectively, I am satisfied from a rough albeit, inexpertly informal perusal of them that there is a strong similiarity between them. In the circumstances I am satisfied that the disputed initial in Ex.H, on the balance of probabilities is the hand-writing of Mr. Louis Mitchell.

The next question to be decided is whether Ex. H intends to create an obligation between the parties.

Mr. Flynn argued that even if Ex. H was accepted as an authentic document, the question still remained whether the parties had the serious and deliberate intention to create a legal obligation between them in respect of Ex. H. He mentioned that the applicant was aware that his employment with the Respondent depended on the approval of USAID and since such approval was not granted, Ex. H did not create a legal obligation between the parties.

Mr. Dunseith on the other hand submitted that Ex. H did create a legal obligation between the parties and in the circumstances the parties did intend to enforce the terms and conditions contained therein. He further submitted that the applicant was not aware that his appointment and renewal depended on the approval of the USAID, as this fact was never communicated to him.

Prolonged negotiations had taken place between the applicant and Mr. Louis Mitchell representing the Respondent; emerging in the draft agreement (Ex. G.) and then ultimately in the Agreement itself (Ex. H). In my view Ex. H is a document which records a consensus. According to the Applicant this document was prepared and signed by Louis after he had heard from the USAID's approval.

Having perused the Agreements that had been entered into between the Applicant and the Respondent, Exs. D and E and more especially Ex. H, I could not find any such conditions that directly or indirectly suggests that the approval of the

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USAID was a prerequisite for the applicant's renewal. Nor was any document produced to show that the applicant was aware of this fact. However it must be noted that in cases of this nature, the Court does not try to discover the intention by looking into the minds of the Parties. It looks at the situation in which they were placed and asks itself: would reasonable people regard the Agreement as intended to be binding. After very careful consideration, I have come to the conclusion that Ex. H is a valid Agreement that had been entered into between the Applicant and the Respondent with the intention of creating a legal obligation between them. Therefore the failure of the Respondent to renew the Contract of the applicant in terms of Ex. H in my view signifies that he had been unfairly terminated.

On the question of the Applicant's claims, after careful consideration I have come to the conclusion that he should be awarded one month's salary in lieu of Notice. Accordingly I order the Respondent to pay the applicant the sum of E4500/=.

I make this Order as an Award of this Court.

My Assessors agree with my decision.

J.A. HASSANALI,

PRESIDENT.